

PUBLIC NOTICE

The West Virginia Department of Environmental Protection (WVDEP) has proposed a settlement of an Administrative Penalty Order for Lexington Coal Company, LLC which resolves violation(s) of the West Virginia Water Pollution Control Act. In accordance with the Draft Order, Lexington Coal Company, LLC has been assessed administrative penalties and must comply with the Act. Final settlement is subject to comments received during the thirty (30) day period ending January 6, 2023. Comments regarding this Administrative Penalty Order may be submitted to: John Flesher, Inspection & Enforcement Director; West Virginia Department of Environmental Protection, Division of Mining and Reclamation, Inspection & Enforcement; 601 57th Street SE; Charleston, WV 25304; (304) 926-0499. Comments may also be submitted electronically to: DEP.Comments@wv.gov. The proposed settlement may be viewed at the following address: <http://www.dep.wv.gov/pio/Pages/Settlements,Ordersouttopublicnotice.aspx>.



west virginia department of environmental protection

Division of Mining and Reclamation
601 57th Street
Charleston, WV 25304
Phone: 304-926-0440/Fax: 304-926-0456

Harold Ward, Cabinet Secretary
dep.wv.gov

**CONSENT ORDER
ISSUED UNDER THE
WATER POLLUTION CONTROL ACT
WEST VIRGINIA CODE, CHAPTER 22, ARTICLE 11**

TO: Lexington Coal Company, LLC
1051 Main St.
Milton, WV 25541

DATE: May 23, 2022

ORDER NO.: M-22-391

INTRODUCTION

This Consent Order is issued by the Director of the Division of Mining and Reclamation (hereinafter "Director"), under the authority of West Virginia Code, Chapter 22, Article 11, and West Virginia Code, Chapter 22, Article 12 et seq. to Lexington Coal Company, LLC (hereinafter "LCC").

FINDINGS OF FACT

In support of this Order, the Director hereby finds the following:

1. LCC holds West Virginia National Pollution Discharge Permits ("NPDES") issued by the West Virginia Department of Environmental Protection ("WVDEP") for its mining and mining-related operations in West Virginia. Among those WVDEP NPDES Permits is WV0025607 ("Permit").
2. The WVDEP NPDES Permit is issued pursuant to the WVDEP's authority under the West Virginia Water Pollution Control Act pursuant to authority delegated to the WVDEP by the United States Environmental Protection Agency under the Federal Clean Water Act for the issuance of WVDEP NPDES Permits.
3. LCC is required to maintain a Groundwater Protection Plan ("GPP") in accordance with the Groundwater Protection Act, W.Va. Code, Chapter 22 Article 12 and WV38CSR2F.

4. The WVDEP has evaluated agency records beginning with October 2021 through May 23, 2022 regarding the Permit and has completed an evaluation of the Permit's compliance.
5. Based on its evaluation, the WVDEP has documented 3 (three) Single Event Violations of the Permit:
 - a. Single Event Violation #3 – Enforcement Standard 'Narrative Effluent Violation' written on October 6, 2021 and terminated on May 17, 2022.
 - b. Single Event Violation #4 – Enforcement Standard 'Failure to Implement SPCC Plan' written on November 1, 2021.
 - c. Single Event Violation #5 – Enforcement Standard 'Narrative Effluent Violation' written on January 31, 2022 and terminated on February 28, 2022.

ORDER FOR COMPLIANCE

Now, therefore, in accordance with Chapter 22, Article 11, Section 1 et seq. of the West Virginia Code it is hereby agreed between the parties, and ORDERED by the Director:

1. LCC shall immediately take all measures to initiate compliance with all terms and conditions of the Permit.
2. LCC shall comply with the Compliance Schedule and reporting requirements contained in Attachment 1.
3. Within 30 days of entry of this Order, LCC shall submit for the Division's approval a proposed Corrective Action Plan (CAP) with schedule and possible applications for modification(s), outlining how and when LCC will achieve compliance with the remedial measures of the Single Event Violations. This CAP shall address the Single Event Violation #4. The CAP will include costs of construction, maintenance, and operation.
4. The Division shall review the proposed CAP and promptly notify LCC of any comments it may have with the proposed CAP. The parties agree to work together to resolve any issues related by the Division with regards to the CAP. Within 30 days of receipt of the Division's approval of the CAP, LCC shall begin the implementation of the plan in accordance with the scheduled provided therein. Upon approval, the CAP shall be considered a part of this Order.
5. Because of LCC WVDEP NPDES violations of the Permit(s), LCC shall be assessed a Civil Administrative Penalty of \$97,570 (ninety seven thousand five hundred and seventy dollars) to be paid to the Department of Environmental Protection within thirty (30) days of demand for penalty from WVDEP. The penalty amount will be deposited in the Stream Restoration Fund. Payments made pursuant to this paragraph are not tax-deductible for purposes of State or Federal Law.
6. **Total Payment in the amount \$97,570 (ninety seven thousand five hundred and seventy dollars shall be mailed to:**

John Flesher, Inspection & Enforcement Director
Division of Mining and Reclamation
WV-DEP
601 57th Street SE
Charleston, WV 25304

7. The Order for Compliance of this Order satisfies any claim WVDEP has or may have for penalties under the West Virginia Water Pollution Control Act for violations of the effluent limits for outlets which occurred October 2021 through May 23, 2022 in relation to the specified Permits.
8. Stipulated Penalties
 - a. Beginning with the entry date of this Order, LCC shall be liable for stipulated penalties for violations of items 2 through 6 of the Order for Compliance of this Order. These stipulated penalties shall be effective until termination of this Order. These stipulated penalties accrue as follows:
 - i. The first through the 15th day of failing to comply with all terms and conditions of this Order shall result in payment of a stipulated penalty of \$1,000 per day per violation.
 - ii. The 16th through 30th days of failing to comply with all terms and conditions of this Order shall result in payment of a stipulated penalty of \$2,000 per day per violation.
 - iii. The 31st day and all additional days of failing to comply with all terms and conditions of this Order shall result in payment of a stipulated penalty of \$3,000 per day per violation.

OTHER PROVISIONS

1. LCC hereby waives its right to appeal this Order under the provisions of Chapter 22, Article 11, Section 21 of the Code of West Virginia. Under this Order, LCC agrees to take all actions required by the terms and conditions of this Order and consents to and will not contest the Director's jurisdiction regarding this Order. However, LCC does not admit to any factual and legal determinations made by the Director and reserves all rights and defenses available regarding liability or responsibility in any proceedings regarding LCC other than proceedings, Administrative or Civil, to enforce this Order.
2. The Director reserves the right to take further action if compliance with the terms and conditions of this Order does not adequately address the violations noted herein and reserves all rights and defenses which he may have pursuant to any legal authority, as well as the right to raise, as a basis for supporting such legal authority or defenses, facts other than those contained in the Findings of Fact.
3. If any event occurs which causes delay in the achievement of the requirements of this Order, LCC shall have the burden of proving that the delay was caused by circumstances beyond its reasonable control which could not have been overcome by due diligence (i.e., force majeure). Force majeure shall not include delays caused or contributed to by the lack of sufficient funding. Within three (3) working days after LCC becomes aware of such a delay, notification shall be provided to the Assistant Deputy Director and shall,

within ten (10) working days of initial notifications, submit a detailed written explanation of the anticipated length and cause of the delay, the measures taken and/or to be taken to prevent or minimize the delay, and a timetable by which LCC intends to implement these measures. If the Director agrees that the delay has been or will be caused by circumstances beyond the reasonable control of LCC (i.e., force majeure), the time for performance hereunder shall be extended for a period of time equal to the delay resulting from such circumstances. A force majeure amendment granted by the Director shall be considered a binding extension of this Order and of the requirements herein. The determination of the Director shall be final and not subject to appeal.

4. Compliance with the terms and conditions of this Order shall not in any way be construed as relieving LCC of the obligation to comply with any applicable law, Permit, other order, or any other requirement otherwise applicable. Violations of the terms and conditions of this Order may subject LCC to additional penalties and injunctive relief in accordance with the applicable law.
5. This Order shall terminate upon the verification of WVDEP that LCC has met all requirements with the Order and is in full compliance.
6. The provisions of this Order are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.
7. This Order is binding on LCC, its successors and assigns.
8. The entry date of this Order shall be the date the Order is executed by the Director.

Public Notice begin date: _____

Public Notice end date: _____

Jonathan Rorrer, Acting Director
West Virginia Department of Environmental Protection
Division of Mining and Reclamation

Date

Attachment 1

The Permittee shall achieve compliance with the requirements of the Order in accordance with the following Compliance Schedule:

a. Payment of Civil Administrative Base Penalty	Pursuant to Sections 5 and 6 of the 'Order for Compliance' of this Order
b. Submit required Corrective Action Plan	Within 30 days of entry date of this Order
c. Submit a Status Report to the Assistant Deputy Director, Permit Inspector and Regional NPDES Supervisor addressing Single Event Violation #4	Within 60 days of entry date of Order
d. Complete Remedial Measures for Single Event Violation #4	As soon as possible but no later than 90 (ninety) days from the entry date of this Order

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party:	Lexington Coal Company, LLC	WVNPDES No.:	WV0025607
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Treatment System Design Maximum Flow: N/A MGD

Treatment System Actual Average Flow: N/A MGD (if known)

Enter FOF# and rate each finding as to Potential and Extent.

1)	Potential for Harm Factor	Factor Range	FOF#											
			No T	No T	No T	T	T	T	T AI	T AI	T AI	T I	T I	T I
a)	Amount of Pollutant Released	1 to 3	1	1	2	1	1	2	1	1	2	1	1	2
b)	Toxicity of Pollutant	0 to 3	1	1	1	1	1	1	3	3	3	1	1	1
c)	Sensitivity of the Environment	0 to 3	1	1	1	3	3	3	3	3	3	2	2	2
d)	Length of Time	1 to 3	1	1	1	1	1	1	1	1	1	1	1	1
e)	Actual Exposure and Effects thereon	0 to 3	1	1	1	1	1	1	1	1	1	1	1	1
	Average Potential for Harm Factor		1	1	1.2	1.4	1.4	1.6	1.8	1.8	2	1.2	1.2	1.4
2)	Extent of Deviation Factor	Factor Range												
	Degree of Non-Compliance	1 to 3	1	2	3	1	2	3	1	2	3	1	2	3

Potential for Harm Factors:

1)c - Sensitivity of the Environment Potentially Affected (0 for "dead" stream)

1)d - Length of Time of Violation

1)e - Actual Human/Environmental Exposure and Resulting Effects thereon

Examples/Guidance:

Note: Rate as 1 for Minor, 2 for Moderate and 3 for Major. Rate as 0 if it does not apply.

Minor = exceedance of permit limit by <=40% for Avg. Monthly or <=100% for Daily Max., exceed numeric WQ standard by <= 100%, or report doesn't contain some minor information.

Moderate = exceedance of permit limit by >= 41% and <= 300% for Avg. Monthly, >= 101% and <= 600% for Daily Max., exceed numeric WQ standard by >= 101% and <= of 600% or report doesn't fully address intended subject matter.

Major = exceedance of permit limit by >= 301% for Avg. Monthly, >= 601% for Daily Max., exceed numeric WQ standard by >= 601%, failure to submit a report, failure to obtain a permit, failure to report a spill, etc. Note that a facility in SNC should be rated as major for length of time and degree of non-compliance.

Narrative WQ standard violations - case-by-case.

Continue rating Findings of Facts (FOF) here, if necessary. Otherwise, continue on Page 3.

1)	Potential for Harm Factor	Factor Range	FOF#											
			TIAL	TIAL	TIAL					5(a) SEV# 3	5(c) SEV# 5			
a)	Amount of Pollutant Released	1 to 3	1	1	2					3	3			
b)	Toxicity of Pollutant	0 to 3	3	3	3					3	2			
c)	Sensitivity of the Environment	0 to 3	2	2	2					2	2			
d)	Length of Time	1 to 3	1	1	1					3	1			
e)	Actual Exposure and Effects thereon	0 to 3	1	1	1					2	1			
	Average Potential for Harm Factor		1.6	1.6	1.8	No	No	No	No	3	2	No	No	No
2)	Extent of Deviation Factor	Factor Range												
	Degree of Non-Compliance	1 to 3	1	2	3					3	2			

		Extent of Deviation from Requirement		
		Major	Moderate	Minor
Potential for Harm to Human Health or the Environment	Major	\$8,000 to \$10,000	\$6,000 to \$8,000	\$5,000 to \$6,000
		\$4,000 to \$5,000	\$3,000 to \$4,000	\$2,000 to \$3,000
	Moderate	\$1,500 to \$2,000	\$1,000 to \$1,500	Up to \$1,000

FOF #	Potential for Harm	Extent of Deviation	Penalty	Multiple Factor	Base Penalty
No T	Minor	Minor	\$1,000		\$0
No T	Minor	Moderate	\$1,500		\$0
No T	Moderate	Major	\$4,200		\$0
T	Moderate	Minor	\$2,400		\$0
T	Moderate	Moderate	\$3,400		\$0
T	Moderate	Major	\$4,600		\$0
T AI	Moderate	Minor	\$2,800		\$0
T AI	Moderate	Moderate	\$3,800		\$0
T AI	Moderate	Major	\$5,000		\$0
T I	Moderate	Minor	\$2,200		\$0
T I	Moderate	Moderate	\$3,200		\$0
T I	Moderate	Major	\$4,400		\$0
0	FALSE	FALSE	FALSE		\$0
TIAL	Moderate	Minor	\$2,600		\$0
TIAL	Moderate	Moderate	\$3,600		\$0
TIAL	Moderate	Major	\$4,800		\$0
0	FALSE	FALSE	FALSE	1	\$0
FTS	Major	Major	\$10,000		\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
5(a) SEV#3	Major	Major	\$10,000	1	\$10,000
5(c) SEV#5	Moderate	Moderate	\$4,000	1	\$4,000
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
Total Base Penalty					\$14,000

Penalty Adjustment Factors

(pursuant to 47CSR1-7.2)

Penalty Adjustment Factor

7.2.b.1 - Degree of or absence of willfulness and/or negligence - 0% to 30% increase

7.2.b.4 - Previous compliance/noncompliance history - 0% to 100% increase - based upon review of last three (3) years - Warning = maximum of 5% each, N.O.V. = maximum of 10% each, previous Order = maximum of 25% each - Consistent DMR violations for <1 year = 10% maximum, for >1 year but <2 years = 20% maximum, for >2 years but <3 years = 30% maximum, for >3 years = 40 % maximum

7.2.b.6 - Economic benefits derived by the responsible party (increase to be determined)

7.2.b.7 - Public Interest (increase to be determined)

7.2.b.8 - Loss of enjoyment of the environment (increase to be determined)

7.2.b.9 - Staff investigative costs (increase to be determined)

7.2.b.10 - Other factors

Size of Violator: 0 - 50% decrease

NOTE: This factor is not available to discharges that are causing a water quality violation. This factor does not apply to a commercial or industrial facility that employees or is part of a corporation that employees more than 100 individuals.

Avg. Daily WW Discharge Flow (gpd)	% Reduction Factor
< 5,000	50
5,000 to 9,999	40
10,000 to 19,999	30
20,000 to 29,999	20
30,000 to 39,999	10
40,000 to 99,999	5
> 100,000	0

Additional Other factors to be determined for increases or decreases on a case-by-case basis.

Public Notice Costs (cost for newspaper advertisement)

7.2.b.2 - Good Faith - 10% decrease to 10% increase

7.2.b.3 - Cooperation with the Secretary - 0% to 10% decrease

7.2.b.5 - Ability to pay a civil penalty - 0% to 100% decrease

Base Penalty Adjustments

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(pursuant to 47CSR1-7.2)

Penalty Adjustment Factor	% Increase	% Decrease	Base Penalty Adjustments
7.2.b.1 - Willfulness and/or negligence -	20		\$2,800
7.2.b.4 - Compliance/noncompliance history -	20		\$2,800
7.2.b.6 - Economic benefits - (flat monetary increase)	\$73,500		\$73,500
7.2.b.7 - Public Interest - (flat monetary increase)			\$0
7.2.b.8 - Loss of enjoyment - (flat monetary increase)			\$0
7.2.b.9 - Investigative costs - (flat monetary increase)			\$0
7.2.b.10 - Other factors (size of violator)			\$0
7.2.b.10 - Additional Other Factors - Increase (flat monetary increase)		SEV #4 - pursuant to WV Code Chapter 22 Article 12	\$4,410
7.2.b.10 - Additional Other Factors - Decrease (flat monetary decrease)			\$0
Public Notice Costs (flat monetary increase)	\$60		\$60
7.2.b.2 - Good Faith - Increase			\$0
7.2.b.2 - Good Faith - Decrease			\$0
7.2.b.3 - Cooperation with the Secretary			\$0
7.2.b.5 - Ability to Pay			\$0
Penalty Adjustments			\$83,570
Penalty =			\$97,570

Estimated Economic Benefit Item	Estimated Benefit (\$)
Monitoring & Reporting	
Installation & Maintenance of Pollution Control Equipment	
O&M expenses and cost of equipment/materials needed for compliance	\$73,500
Permit Application or Modification	
Competitive Advantage	
Estimated Economic Benefit	\$73,500
Comments: Cost of chemicals - \$10,500/months x 7 months = \$73,500	

TABLE A**Ratings for Deviation from Requirements**

1 to 3 -- The violator had completed nearly all requirements of the statute, rule, order, or permit condition in question. However, there were some aspects of the requirements which were clearly not accomplished or the requirements were completed in most, but not all, areas of the facility.

4 to 6 -- The violator had completed approximately one-half of the requirements of the statute, rule, order, or permit condition in question or the requirements were not completed in approximately one-half of the areas of the facility.

7 to 9 -- The violator has completed almost none of the requirements of the statute, rule, order, or permit condition in question. However, some aspects of the requirements clearly were accomplished or the requirements were not completed in most, but not all, areas of the facility.

10 -- The violator had not completed any of the requirements of the statute, rule, order, or permit condition in question or the requirements were not completed in any area of the facility.

TABLE B**Ratings of Potential for Harm**

1 to 3 -- The violation is of an administrative nature and could not result in a potential for harm to human health or the environment.

4 to 6 -- The violation is of an administrative or a physical nature and may result in a minor potential for harm to human health or the environment (e.g., report doesn't contain necessary information of a specific nature, necessary environmental controls are present but not maintained).

7 to 9 -- The violation is of an administrative or a physical nature and may result in a moderate potential for harm to human health or the environment (e.g., report does not fully address intended subject matter or is deficient regarding specific information concerning multiple areas, violator has not made a good faith effort to install/maintain necessary environmental controls).

10 -- The violation is of an administrative or physical nature and may result in a major potential for harm to human health or the environment (e.g., failure to submit a report, failure to provide necessary environmental controls).

TABLE C

Seriousness of Groundwater Protection Act Violation

	Deviation from Requirement									
	1	2	3	4	5	6	7	8	9	10
Potential for Harm										
1	100	140	190	250	320	400	490	590	700	725
2	200	240	290	350	420	500	590	690	800	825
3	400	440	490	550	620	700	790	890	1000	1125
4	700	740	790	850	920	1000	1090	1190	1300	1425
5	1025	1065	1115	1175	1245	1325	1415	1515	1625	1750
6	1375	1415	1465	1525	1595	1675	1765	1865	1975	2100
7	1725	1765	1815	1875	1945	2025	2115	2215	2325	2450
8	2075	2115	2165	2225	2295	2375	2465	2565	2675	2800
9	2425	2465	2515	2575	2645	2725	2815	2915	3025	3150
10	2775	2815	2865	2925	2995	3075	3165	3265	3375	3500

TABLE D**Ratings for Negligence/Good Faith**

1 -- The violation is not the result of negligence and the violator expended all possible effort to comply with the requirement in question or the violator has completed all actions to correct the violation.

2 to 4 -- The violation is the result of an oversight by the violator and could have been avoided if a more conscientious effort had been made in the operation of the facility or the violator has begun but not completed current actions to correct the violation.

5 to 7 -- The violation is obvious and a result of a lack of reasonable care by the violator or the violator has taken inadequate action to prevent the violation.

8 to 10 -- The violation is the result of a complete disregard for the requirement in question or the violator failed to respond to a previous enforcement action pertaining to the same requirement.

TABLE E**Negligence/Good Faith**

Negligence/Good	Multiplying Factor
1	0.5
2	0.6
3	0.7
4	0.8
5	1.0
6	1.2
7	1.4
8	1.6
9	1.8
10	2.0

TABLE F

History of Groundwater Protection Act Noncompliance

Number of Previous Enforcement Actions	Dollar Amount
1	\$100.00
2	\$200.00
3	\$350.00
4	\$550.00
5	\$850.00
6	\$1250.00
7	\$1650.00
8	\$2150.00
9	\$2750.00
10 and greater	\$3350.00

TABLE G

Calculation of Civil Administrative Penalty Assessment

Seriousness of Violation		\$3,150
Negligence/Good Faith	X	1.4
Subtotal:		\$4,410
Unique Factor	X	0
Subtotal:		\$4,410
History of Noncompliance	+	0
<u>Total Assessment:</u>		\$4,410